



DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 204

[Docket DARS-2021-0017]

RIN 0750-AL48

Defense Federal Acquisition Regulation Supplement: Contract Closeout Authority for DoD Services Contracts (DFARS Case 2021-D012)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2021.

DATES: Effective [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

FOR FURTHER INFORMATION CONTACT: Ms. Kimberly R. Ziegler, telephone 571-372-6095.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the **Federal Register** at 86 FR 48366 on August 30, 2021, to implement section 820 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2021 (Pub. L. 116-283). Section 820 authorizes DoD contracting

officers to close out certain physically complete contracts or groups of contracts through modification of such contracts, without completing the requirements of Federal Acquisition Regulation (FAR) 4.804-5(a)(3) through (15) based upon the age of the contract action.

Two respondents submitted public comments in response to the proposed rule.

II. Discussion and Analysis

DoD reviewed the public comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments is provided, as follows:

A. Summary of Significant Changes From the Proposed Rule

There are no changes from the proposed rule as a result of public comments.

B. Analysis of Public Comments

1. Support for the rule

Comment: The respondent supported the rule and requested DoD publish the final rule expeditiously.

Response: DoD acknowledges the support.

2. Expansion of the statutory criteria

Comment: The respondent expressed concern that the rule, as well as the current DFARS text that implemented the statutory direction in the NDAA for FY 2017, reflects the language in section 820 of the FY 2021 NDAA. The respondent asserts that

the statutory language will not achieve the intent of Congress without further clarification.

Response: This final rule implements the statutory authority provided in section 820 of the NDAA for FY 2021. There is nothing in the statute to indicate Congress had any intent other than the plain language meaning of that section as stated. DoD previously published a final rule at 84 FR 18153 on April 30, 2019, to implement section 836 of the NDAA for FY 2017.

3. Additional guidance for the workforce

Comment: The respondent recommends DoD develop Procedures, Guidance, and Information (PGI) for the acquisition workforce that includes additional guidance on the application of the eligibility criteria and establishment of costs.

Response: DoD has no indication that the acquisition workforce requires an update to the PGI on contract closeout.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Products Including Commercially Available Off-the-Shelf (COTS) Items, and for Commercial Services

This rule does not create any new solicitation provisions or contract clauses. It does not impact any existing solicitation provisions or contract clauses.

IV. Expected Impact of the Rule

DFARS 204.804(3)(i) currently provides for the expedited closeout of contracts or groups of contracts without completion of a reconciliation audit or other corrective actions required

by FAR 4.804-5(a)(3) through (15) if certain criteria are met. If a contract was entered into at least 17 years prior to the current fiscal year, is physically complete, and has been determined not reconcilable, the contracting officer may close the contract through a negotiated settlement.

This final rule reduces the age requirement from 17 years to 10 years for military construction and shipbuilding and 7 years for all other contract actions. The rule adds a new requirement that these contracts must be physically complete at least 4 years prior to the current fiscal year.

The expanded authority will apply to more recent contracts, subject to the other criteria in DFARS 204.804(3)(i), to reduce the current backlog and administration requirements for contracts eligible for closeout.

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section

6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

VI. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801-808) before an interim or final rule takes effect, DoD will submit a copy of the interim or final rule with the form, Submission of Federal Rules Under the Congressional Review Act, to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule under the Congressional Review Act cannot take effect until 60 days after it is published in the **Federal Register**. The Office of Information and Regulatory Affairs has determined that this rule is not a major rule as defined by 5 U.S.C. 804.

VII. Regulatory Flexibility Act

DoD does not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because this rule implements requirements primarily for the Government. However, a final regulatory flexibility analysis (FRFA) has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

This rule amends the Defense Federal Acquisition Regulation Supplement (DFARS) to implement section 820 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2021 (Pub. L. 116-283). Section 820 expands the application of the

expedited contract closeout authority of section 836 of the NDAA for FY 2017, implemented at DFARS 204.804(3)(i)(A), to certain contracts or groups of contracts that were awarded at least 7 to 10 FYs before the current FY and have completed performance or delivery at least 4 years prior to the current FY. The new 10-year standard will apply to contracts or groups of contracts for military construction, as defined in 10 U.S.C. 2801, or shipbuilding, while the 7-year standard will apply to all other contracts.

The objective of the rule is to implement the requirements of section 820, which expands the application of the expedited contract closeout authority of section 836 of the NDAA for FY 2017 to more recent, physically complete contracts. The legal basis of the rule is section 820 of the NDAA for FY 2021.

There were no significant issues raised by the public in response to the initial regulatory flexibility analysis.

This rule will likely affect small entities that have been or will be awarded DoD contracts, including those under FAR part 12 procedures for the acquisition of commercial products, including commercially available off-the-shelf items, and commercial services. Data was obtained from the Electronic Data Access module of the Procurement Integrated Enterprise Environment for contracts that were physically completed at least 4 years ago and are eligible for closeout between the new standard of 7 or 10 years and the previous standard of at least 17 fiscal years after award. These numbers were then compared to the Federal

Procurement Data System (FPDS) to estimate the number of contracts awarded to small entities. Contracts subject to the previous standard of 17 years are included in this estimate.

As of April 2021, the FPDS data indicate that approximately 29,200 contracts, eligible for expedited closeout under the 7-year standard, were awarded to an estimated 4,490 unique small entities. An additional estimated 1,775 contracts, subject to the 10-year standard, were awarded to approximately 576 small entities. As a result, DoD estimates that approximately 5,066 small entities will have the opportunity to benefit from the expanded expedited contract authorities provided in this rule.

The rule does not impose any new reporting, recordkeeping, or compliance requirements.

There are no practical alternatives that will accomplish the objectives of the statute.

VIII. Paperwork Reduction Act

This rule does not contain any information collection requirements that require the approval of the Office of Management and Budget (OMB) under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Part 204

Government procurement.

Jennifer D. Johnson,

Editor/Publisher, Defense Acquisition Regulations System.

Therefore, 48 CFR part 204 is amended as follows:

PART 204—ADMINISTRATIVE AND INFORMATION MATTERS

1. The authority citation for 48 CFR part 204 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

2. Amend section 204.804 by revising paragraph (3)(i) to read as follows:

204.804 Closeout of contract files.

* * * * *

(3)(i) In accordance with section 836 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114-328), section 824 of the National Defense Authorization Act for Fiscal Year 2018 (Pub. L. 115-91), and section 820 of the National Defense Authorization Act for Fiscal Year 2021 (Pub. L. 116-283), contracting officers may close out contracts or groups of contracts through issuance of one or more modifications to such contracts without completing a reconciliation audit or other corrective action in accordance with FAR 4.804-5(a)(3) through (15), as appropriate, if each contract—

(A)(1) For military construction (as defined at 10 U.S.C. 2801) or shipbuilding, was awarded at least 10 fiscal years before the current fiscal year; or

(2) For all other contracts, was awarded at least 7 fiscal years before the current fiscal year;

(B) The performance or delivery was completed at least 4 years prior to the current fiscal year; and

(C) Has been determined by a contracting official, at least one level above the contracting officer, to be not otherwise reconcilable, because—

(1) The contract or related payment records have been destroyed or lost; or

(2) Although contract or related payment records are available, the time or effort required to establish the exact amount owed to the U.S. Government or amount owed to the contractor is disproportionate to the amount at issue.

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